IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 545 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VALLABHBHAI N PATEL THRO'P.O.AGANPATBHAI GOVINDBHAI

Versus

JAMNABEN D/O NAKA MORAR

Appearance:

1. Appeal from Order No. 545 of 1997

MR ZUBIN F BHARDA for Petitioner No. 1

NOTICE SERVED for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA

Date of decision: 09/10/2001

ORAL JUDGEMENT

1. The appellant - original plaintiff has challenged, in this Appeal, the impugned order dated 31.7.1997 passed by the learned Assistant Judge, Navsari,

in Regular Civil Appeal No.18 of 1992 filed by the present respondent - Jamnaben whereby he allowed the Appeal and set aside the impugned Judgment and Decree dated 26.10.1989 passed by the learned Civil Judge (SD), Navsari in favour of the present appellant - plaintiff in Regular Civil Suit No.149 of 1988 and remanded the matter to the learned trial Judge to rehear Suit and decide the same on merit after affording sufficient opportunity to both the parties.

2. The appellant - plaintiff had filed Regular Civil Suit No.149 of 1988 before the Court of learned Civil Judge (SD), Navsari against the present respondent defendant for declaration that the defendant had no right to creat any obstruction and interference in respect of the land and property shown in Para : 11 of the plaint which was of the exclusive ownership of the plaintiff and prayed that the respondent - defendant be restrained from entering or interfering with the possession of the plaintiff regarding the said land in question. The defendant was duly served with the notice in the Suit, but for the reasons best known to her she had not filed any written statement. It appears from the Judgment of the learned trial Judge that though sufficient opportunities were given to the defendant she has not come forward to cross examine the plaintiff and his witnesses. Therefore, relying upon the oral testimony as well as the documentary evidence produced by the plaintiff the learned trial Judge came to the conclusion that the plaintiff has proved that he was exclusive owner and in actual possession of the land in question and that the defendant had no right of way or any other right in the Suit property. He has also come to the conclusion that the defendant had falsely claimed right of way through the suit land and the plaintiff had reasonable apprehension in his mind that the defendant may unlawfully enter the suit field and creat her right of way. Accordingly, the learned trial Judge decreed the Suit by Judgment and Decree dated 26.10.1989 and held that the suit land is of the exclusive ownership and in possession of the plaintiff and that the defendants have no right to interfere or obstruct the use or enjoyment of the Suit land by the plaintiff. Accordingly the defendant was permanently restrained from interfering from onstructing, directly or indirectly, with the possession of the plaintiff of the Suit land.

3. The aforesaid Judgment and Decree passed by the learned trial Judge was challenged by the respondent - defendant in Regular Civil Appeal No.18 of 1992 before the Court of learned Assistant Judge, Valsad at Navsari.

The said Appeal was allowed by the learned Assistant Judge holding that sufficient opportunity to lead the evidence and cross examine the plaintiff was not given to the defendant by the learned trial Judge. Accordingly he allowed the Appeal, set aside the Judgment and Decree passed by the trial Court and remanded the matter to the learned trial Judge with a direction to decide the Suit afresh on merit after affording an opportunity to both the parties. This order is challenged in this Appeal by the appellant - plaintiff.

4. Learned Counsel Shri Bharda for the appellant plaintiff vehemently submitted that once the defendant was duly served with the summons in the Suit and that she appeared through her Advocate then she will be responsible if she does not show any interest in cross examining the plaintiff and his witnesses. He pointed out that the Suit was adjourned from 5.4.1989 till 17.10.1989 and the defendant had shown no interest in the proceeding and therefore the learned trial Judge had no option, but to proceed with the Suit and decide it on merit. When the learned trial Judge proceeded with the Suit in absence of her Counsel and decreed the same in favour of the plaintiff then it was not open to the defendant to make any grievance before the learned Assistant Judge in Appeal. He pointed out that though the Judgment and Decree was passed by the trial Court on 26.10.1989 the Appeal was filed in the year 1992. He also pointed out that in this Appeal though the defendant is duly served on this Appeal as well as Civil Application No.10577 of 1997 regarding interim relief she had not bothered to come to this Court. He, thereore, submitted that the learned trial Judge was fully justified in proceeding with the Suit and decreeing the same in favour of the appellant - plaintiff. The said Judgment and Decree ought not to have been disturbed by the learned Assistant Judge in Appeal on the ground that sufficient opportunities were not given.

5. Though the respondent is duly served no one is appearing. Therefore, with the assistance of Shri S.M.Shah, Senior Advocate, sitting in the Court, this Appeal is decided firstly on preliminary issue as to how this Appeal would be maintainable. Shri Bharda, learned Counsel for the appellant has relied upon the Judgment of the Hon'ble Supreme Court in the case of NAINSINGH v/s. KOONWARJEE & ORS., reported in AIR 1970 SC 997 and submitted that in case of remand Appeal would lie. However, Shri S.M.Shah immediately pointed out that the Appeal would be maintainable under the provisions of Order : 43, Rule :1(u) of the Code of Civil Procedure.

Thus, it is clear that the Appeal would lie.

6. Coming to the merits of the case it is clear that the learned trial Judge was fully justified in passing the decree against the defendant when she had shown list interest in proceeding with the Suit. From the Judgment of the trial Court it is clear that sufficient opportunities were given to the defenadnt. If she does not avail that opportunity then she has to blame herself. Shri Bharda was right in relying upon the learned Single Judge of Orissa High Court in the case of BISHNU PUTEL v/s. BAJRA PUTEL, reported in AIR 1964 ORISSA 250. It was held in Bishnu Patel's case (Supra) that ..."the policy of the law is that, once the matter has been fairly tried between the parties, it should not, except in special circumstances be reopened and retried."

7. Having carefully gone through the impugned Judgment passed by the learned Assistant Judge in Appeal it is clear that there were no special circumstances to reopen the matter which was properly decided by the learned trial Judge. One has to blame himself or herself if he or she does not remain present when the Suit is tried before the learned trial Judge. In the instant case sufficient opportunities were given to the defendant, but she has not availed of that opportunities. Therefore, in my considered opinion the learned Assistant Judge is wholly in error in remanding the matter to the learned trial Judge.

8. In view of above discussion the Appeal is allowed. The impugned Judgment and order dated 31.7.1997 passed by the learned Assistant Judge in Regular Civil Appeal No.18 of 1992 is hereby quashed and set aside. In the net result the Judgment and Decree dated 26.10.1989 passed by the trial Court in Regular Civil Suit No.149 of 1988 is restored to the file. However, there shall be no order as to cost in this Appeal.

As the main Appeal is Allowed, Civil Application No.10577 of 1997 will not survive. Accordingly the same is disposed of.

Date : October 09, 2001 (B.J.Shethna, J.)

sas